81449-0
NO. 32426-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

NEIL GRENNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

STATEMENT OF ADDITIONAL GROUNDS OF APPELLANT

Neil Grenning
Appellant

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A. DECLARATION OF APPELLANT

I, Neil Grenning, have received and reviewed the Opening Brief of Appellant prepared and submitted by my appellate attorney, Rita J. Griffith of Seattle, as well as the Verbatim Report of Proceedings provided by the court. Pursuant to RAP 10.10 I hereby submit for review the additional errors and relief sought in Parts B, C and D, of the following. This Statement of Additional Grounds incorporates Part C, "Statement of the Case," prepared and submitted in the Opening Brief by my appellate attorney, and adds pertinent details where necessary. I hereby declare that all record and case law citation herein is accurate to the best of my knowledge and ask the appellate court to grant latitude where the incompleteness of my arguments or unorthodox citation to law reflects my lay comprehension of the material.

B. ADDITIONAL ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Grenning his right to be free of unreasonable interrogation and seizure under state and federal constitutions by denying his motion to suppress information obtained as a result of such, pursuant to CrR 3.5.

2. The trial court denied Mr. Grenning's right to a speedy trial under state and federal constitutions.

3. The trial court denied Mr. Grenning his state and federal constitutional rights to a fair trial by allowing the state to withhold evidence beyond a timely discovery period.

4. The trial court denied Mr. Grenning his state and federal constitutional rights to a fair trial by permitting testimony by State's witness pursuant to a fraudulent investigation.

5. The State engaged in prosecutorial misconduct with respect to charging documents and unit of prosecution.

6. The State violated the Rules of Professional Conduct by engaging in unauthorized extrajudicial communication with the media.

7. The trial court denied Mr. Grenning his state and federal constitutional rights by imposing an excessive and unreasonable bail.

8. The trial court erred in not ruling on defense's Motion to Return Property brought pursuant to CrR 2.3(e).

C. ARGUMENT

1. THE TRIAL COURT ERRED IN NOT SUPPRESSING MR. GRENNING'S STATEMENTS

The trial court erred in denying suppression of statements obtained pursuant to two interrogations (1) because the police failed to obtain a warrant to arrest Mr. Grenning and (2) police failed to timely inform Mr. Grenning he was under arrest with proper mirandizement.

a. The arrest was made without the authorization of a warrant

No record is made that officers Deccio and Tscheuschner ever sought a warrant when they arrested Mr. Grenning March 3, 2002. Neither officer can agree on whether probable cause existed prior to confrontation, or whether the confrontation was to glean a probable cause. RP 57-58, 320, 333.[1] The officers confronted Mr. Grenning in the restaurant where he was employed sometime between 9:13 and 9:29 p.m. and assert they "need to talk" to him, RP 50, 163, moving him by show of authority to a small closet sized office where questions were put to him, not as an option, but in preparation for an undeclared arrest. RP 50-51, 61-62, 164, 174-175.

The U.S. Constitution prohibits unreasonable search and seizure. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation." U.S. Constitution, Fourth Amendment. Furthermore, the Washington State Constitution guarantees that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article 1, Section 7.

Although a warrantless arrest may be effected where an officer has probable cause to believe a felony has been committed, that statutory authorization only applies where arrest occurs in a public place. State v. Mierz, 72 Wash. App. 783, 866 P.2d 65, reconsideration denied, opinion corrected, 875 P.2d 1228, review

[1] The verbatim report contains numerous dated files. Volumes 1-7 which comprise trial and sentencing will be cited without dates. All other citations will be accompanied by the date of proceeding.

granted, 125 Wash.2d 1007, 889, P.2d 499, affirmed, 127 Wash. 2d 460, 901 P.2d 286, 50 A.L.R. 5th 921 (1994). A warrantless arrest in a non-public place is presumptively unreasonable and violative of the Fourth Amendment. Payton v. New York, 445 U.S. 573, 586; 89, 63 L. Ed. 2d 639, 100, S. Ct. 1371 (1980). An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be influenced by the familiar shortcomings of hindsight judgment. Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223 (1964).

There is no doubt that Mr. Grenning was at his place of business, a private restaurant, protected against unreasonable entry with intent to seize without the authority of law vested in a warrant. There are means to circumvent the Fourth Amendment requirement, the most common of which is the "exigent circumstances" exception, in which it is recognized that some situations present a compelling need for instant arrest due to the probability of delay incurring endangerment to life or limb. United States v. Alvarez, 810 F.2d 879, U.S. App. (9th Cir. 1987). It has however been found that "the government bears a heavy burden of demonstrating that exceptional circumstances justified the departure from the normal procedure for obtaining a warrant." United States v. Driver, 776 F.2d 807 810 (9th Cir. 1985).

The alleged crime in question is speculated to have occurred at least three months prior to the subsequent investigation, closer to "Christmas of 2001." See:

Declaration for Determination of Probable Cause, CP at 1. It is clear there were no "exigent circumstances" that would have required the Tacoma Police to immediately arrest Mr. Grenning absent a warrant. The police entered a private business without authority of law and the record reveals no good-faith effort to obtain a warrant, even by means of telephonic warrant procedures in effect in nearly all populous areas of the U.S. today. Untied States v. Manfredi, 722 F.2d 519 (9th Cr. 1983) follows:

> We agree with appellant that in determining whether exigent circumstances justify an exception to the general rule requiring a warrant, the burden rests on the government to show that the warrantless entry was "imperative." McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 196, 93 L. Ed. 153 (1948). We also agree with appellant that this standard is not satisfied unless the government demonstrates that a warrant could not have been obtained in time even by telephone.

Concern over the negligence in attempting to secure a telephone warrant is also reiterated in United States v. Wulferdinger, 782 F.2d 1473, 1476-77 (9th Cir. 1986), where officers failed to employ California's readily available telephonic warrant procedure, outlined in Cal. Penal Code § 1526(b) (West 1982). United States v. Alvarez adds the following:

> The requirement that the government attempt, in good faith, to secure a warrant should dispose of government concerns that magistrates are not always available to approve warrant applications, even by telephone. The telephone warrant requirement is no mere formality. As the Supreme Court has recognized, warrants interpose a neutral and detached magistrate between law enforcement officials and targets of searches and seizures before a search or seizure has occurred. e.g., United States v. Leon, 468 U.S. 89, 913-14, 82 L. Ed.2d 677, 104 S. Ct. 3405 (1984). "Good faith on the part of the arresting officer is not

> enough." Henry v. United States, 361 U.S. 98, 102, 4 L. Ed.2d 134, 80 S. Ct. 168. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. Leon, 468 U.S. at 915 (quoting Beck v. Ohio) [complete citation omitted]

Mr. Grenning's arrest was warrantless and unauthorized. There is no reason why officers could not have at least made a good faith effort to obtain a warrant, even if only be telephone procedure, especially where no exigent circumstances existed. All statements made by Mr. Grenning pursuant to both interrogations should have been suppressed in accordance with CrR 3.5 and State and Federal Constitutions.

b. Mr. Grenning's arrest was not executed in a timely fashion and without proper Mirandizement

There was a lengthy period of time between when officers claimed the entered the restaurant at 9:29 p.m., RP 171-72, and the time Mr. Grenning was transported to the county jail at 10:28 p.m. RP 181. Within that one hour period, police confronted Mr. Grenning, verbally interrogated him, had him commit a 3 page written statement, Mirandized him, and finally placed him under official arrest. If the officer's testimony is to be believed, the signed Miranda statement timed at 9:37 p.m., State's exhibit 2, places the written portion of the statement at least 8 minutes after arrival, likely more where officer Tscheuschner indicates the CAD report is only a "basic outline." RP 171-172. Officers are unsure how long it took for Mr. Grenning to write out his statement, however Mr. Grenning testifies to up to fifteen

minutes. RP 234. This leaves a period of approximately forty minutes entirely unexplained by the officers, where potential interrogation continued without declaration of formal arrest. Unlike the officer's testimony that transit to the county jail happened right after arrest, RP 55, 181, 312-313, 332, Mr. Grenning's testimony of being abandoned in the back of the police vehicle for more than twenty minutes after formal arrest, RP 235, lends more understanding to the otherwise unexplained gap in time, and to his credibility.

Officer Deccio initially testified that the Miranda advisement was signed immediately in the office and only verbally readvised prior to the handwritten statement, RP 51, 55, 64-65, but later testifies it was verbally read initially in the office and committed to a signed advisement some time later before Mr. Grenning made the handwritten statement. RP 329-332. Officer Tscheuschner initially testified Miranda warnings were orally given at first and signed prior to the handwritten statement, RP 165, but later conceded he wasn't sure how many times a Miranda advisement was signed or when, speculating it only happened once. RP 178, 315-317.

The officer's complete confusion as to when a Miranda warning was issued, and their failure to properly report it, State's exhibit 1, juxtaposed with Mr. Grenning's clear recollection that it was not given to him until just before arrest, illustrate the officer's failure to execute a proper arrest procedure and protect Mr. Grenning's constitutional rights.

The officers by show of authority, constrained Mr. Grenning's movement-- admitted he was not free to leave, RP 57-58, 333-334-- yet failed to inform Mr. Grenning he was under arrest for at least thirty minutes if not longer. Mr. Grenning clearly acquiesced to their authority, exhibiting signs of apprehension, RP 50, 65, 163, 176, 302, 328, and clearly felt intimidated where he was not given an option to disengage the questioning, but rather told, "We need to talk." RP 50, 163, 231. The officers abused this thirty minute limbo of undeclared intention, to coerce Mr. Grenning into disclosing information he was unaware was being used to arrest him.

A police officer has not seized an individual merely approaching him in a public place and asking him questions, as long as the individual need not answer and may simply walk away. State v. Thomas, 91 Wash. App. 195, 955 P.2d 420, review denied, 136 Wash.2d 1030, 972 P.2d 407 (1998). In determining whether a defendant was under arrest, it is fact of arrest, and not communication of it, that is decisive; arresting officer may even be mistaken as to whether the defendant is under arrest, but the defendant is under arrest so long as his liberty of movement is substantially restricted. State v. Turpin, 25 Wash. App. 493, 607 P.2d 885, review granted, reversed on other grounds, 94 Wash. 2d 820, 620 P.2d 990, (1980); United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1970, 64 L. Ed. 2d 497, (1980).

Mere acquiescence to authority is not the same as voluntary consent. City of Omaha v. Buffkins, 112 S. Ct. 273, 116, L. Ed.2d 225, 60 U.S.L.W. 3265 (10/07/91); Douglas v. County, Neb, 992 F.2d 465, 469 (8th Cir. 1990). Once police have probable cause to arrest a suspect, delays in making the arrest cannot serve as

an excuse for conducting interviews without Miranda warnings. State v. Dictado, 102 Wash. 2d 277, 687 P.2d 172 (1984). Factors which may be considered in determining whether one has voluntarily consented include whether Miranda warnings (Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)) were given, the degree of education and intelligence of the individual, and whether he or she had been advised of the right to consent. State v. O'Neill, 148 Wn.2d 564 (2003). Custodial interrogation, requiring that a defendant be advised of his constitutional rights, means, questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom in any significant way; custody can occur without formality of arrest and in areas other than in police station. Miranda v. Arizona; Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed.2d 424 (1977).

In this situation of a delayed arrest in lieu of custodial interrogation, one must call into question what information the officers hoped to bootstrap by this method. They arrived with what was deemed to be sufficient probable cause, but were not merely satisfied to arrest Mr. Grenning upon that. It was unknown to the officers prior to the interrogation that Mr. Grenning owned a personal computer and this same piece of information was inserted into subsequent search warrants in a deficient attempt to validate a nexus for its seizure. See: Affidavit in support of search warrant, 03/05/02.

Probable cause must be determined at the time the arrest is made. Facts learned or evidence obtained as a result of stop or arrest cannot be used to support probable

cause unless they were known to the officer at the moment the arrest was made. Allen v. City of Portland, 73 F.3d 232, U.S. App. (9th Cir. 1995). See also Wong Sun v. United States, 371 U.S. 471, 482, 9 L. Ed.2d 441, 83 S. Ct. 407 (1963); Henry v. United States, 361 U.S. 98, 103, 4 L. Ed.2d 134, 80 S. Ct. 168 (1959).

The officers were not merely trying to solve a crime, but concerned primarily with securing a statement from him on which they could get a conviction, the undeviating intent to extract a confession was patent. Spano v. People of the State of New York, 360 U.S. 315, 323-24, 79 S. Ct. 1202, 1207-1208, 3 L. Ed.2d 1265 (1959). Additionally, it would be no defense that the officers had in their possession a valid warrant or probable cause, if in fact their purpose for engaging in the conduct in which they are alleged to have engaged was to deprive one of due process of law, or the execution was a pretext for other conduct; pretextual seizures or searches are illegal, and an intent to violate due process of law vitiates the general shield provided by a warrant. [Practice commentary] Sequoia v. McDonald, 725 F.2d 1091 (7th Cir. 1984); Johnson v. Miller, 680 F.2d 39, 42 (7th Cir. 1982).

The officers flagrantly disregarded the need to timely advise Mr. Grenning of his constitutional rights, failed to account for the hour-long period before transit to county jail, and engaged in an illegal pretextual custodial interrogation without declaring the arrest they came to effect. The delay was used to bootstrap information for prosecutorial purposes. Mr. Grenning's statements should be suppressed pursuant to United States v. Alvarez, CrR 3.5, the Washington Constitution Article 1, Section 7, and the Fourth Amendment of the United States.

2. MR. GRENNING WAS DENIED HIS RIGHT TO SPEEDY TRIAL WHERE THE STATE DELIBERATELY DELAYED DISCLOSURE OF DISCOVERY FOR TACTICAL ADVANTAGE.

The U.S. Constitution holds that "the accused shall enjoy the right to a speedy and public trial," Sixth Amendment, enforced on the states through the due process clause of the Fourteenth Amendment. "[D]enial of speedy trial can be found despite an absence of a demand under some circumstances. See Brady v. United States, 408 F.2d 518 (CA8 1969) (a purposeful or oppressive delay may overcome a failure to demand)." Barker v. Wingo, 407 U.S. 514, 33 L. Ed.2d 101, 92 S. Ct. 2182 (1972). "[A] man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean he is unaware of the necessity for a demand [for trial]." The Lagging Right to Speedy Trial, 51 Va. L. Rev. 1587, 1610 (1965).

A manifest error affecting a constitutional right may be raised for the first time on appeal through the provisions of RAP 2.5(a). State v. Scott, 100 Wn.2d 682, 686, 757 P.2d 492 (1988); State v. Jarmillo, No. 19503-8-II (Wash. App. Div. 2 02/14/1997); State v. Osalde, No. 26327-1-II (Wash. App. Div.2 04/15/2003).

Despite the fact that the record does not find Mr. Grenning having asserted his right to speedy trial, in light of the 28 months that were allowed to pass before the case came to trial-- clearly an excessive length of time-- it is prudent to review the circumstances to determine if his right to speedy trail was abused. The record shows that Mr. Grenning signed a waiver of speedy trial on May 30, 2002 pursuant

to a motion brought by the State requesting more time for investigation. The affidavit of Detective Voce in support of State's motion cited a lack of software and hardware necessary to properly investigate the defendant's computer. CP at 05/30/02.

The State responded to defense's First Omnibus Application for discovery, CP at 04/10/02, that it had already disclosed all the computer investigation logs, records, memoranda and other notes associated with the investigation of the computer. CP at 04/15/02. By May 30, 2002, no further disclosure had been forthcoming from the State, and defense was aware of only a random selection of general child pornography located on the defendant's computer. The State denied that any images of the alleged victim had been located, and sought a continuation. In this instance, where none of the necessary disclosure had been given to the defense, there would have been no way for defense counsel to render adequate defense, Strickland v. Washington, 466 U.S. 668, 685, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984), and there was a clear compromise of having to give the State further time in the hope the discovery demand would be met soon. The State filed charges related to the alleged victim on June 11, 2002, CP at 6-38, not even two weeks after the defendant had conceded the State more time for its investigation.

Thereafter followed two years of arduous discovery demands culminating in a letter filed with the court May 7, 2004 by defense counsel, demanding the same logs of the investigation requested before the speedy trial period expired. CP at 05/07/04, RP 4-5, 9-10. On or before May 26, 2004, but after the discovery demand of May

7, 2004, the State turned over a 5 page handwritten log depicting various dates associated with the computer investigation, initiated as early as 3/11/02. Defense exhibit 144, RP 21, 691-692.

Most disconcerting, however, is that testimony at trial revealed that Detective Voce had discovered images of the alleged victim, used as the sole basis of conviction, before March 27, 2002, long before defense's first discovery demand and long before the speedy trial period expired. Detective Baker admitted Detective Voce showed him pages of thumbnails of the alleged victim before the second warrant of March 27, 2002. RP 409-410. He accurately places the time at which he saw the State's evidence because he recalls obtaining a photo from the alleged victim's mother during that time to assist with identification. State's exhibit 13, RP 413-414.

Detective Voce further condemns the State's position of not having the software or hardware when he testifies that all the software used to procure the evidence at trial was available to him at his lab in March of 2002. RP 697-98. It is clear the State had in its control all the evidence used at trial, with respect to the alleged victim they were investigating, two months before the speedy trial expired.

The Supreme Court has outlined four factors courts should consider in determining whether a defendant has been deprived of his right to speedy trial: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. Barker v. Wingo; State v. Corrado 94 Wn. App. 228, 972 P.2d 515 (1999). There is no question that a delay of more than

two years to go to trial was excessive. "[T]he right to prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed.2d 26 (S. Ct. 05/25/1970).

Mr. Grenning recognizes that the failure to assert the right to a speedy trial weighs against him, but contends that the reason for the delay and the prejudice from it outweighs this in the Supreme Court's balancing test. The State leisurely exploited this time to till up additional charges, See: Declaration for Determination of probable cause, 10/28/03, failed to comply with timely discovery requirements, and committed perjury in the May 30, 2002 declaration to subvert the speedy trial process in pursuance of its zealous investigation.

"A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." Barker v. Wingo. "[A] deliberate delay by the prosecuting authorities to serve their own tactical advantage, the court has held to be an unreasonable delay." State v. Alter, 67 Wn.2d 111, 406 P.2d 765 (1965) (quoting United States v. Provoo, Supra.). See also United States v. Marion, 404 U.S 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957). State v. Price, 94 Wash. 2d 810, 620 P.2d 994 (1980) asserts the following:

> [I]f the state inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such

> unexcused conduct by the State cannot force a defendant to choose between these rights.

Whether the State was obliged to disclose the evidence it apparently already had, or whether additional time was needed, two days before the speedy trial expiration was an inexcusably late moment to give notice to the court and defense, and did not qualify as an "unavoidable circumstance beyond the control of the State." State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989) at 475. It is furthermore no excuse by the State that it did not have in its possession such material facts where the detectives investigating the computer may simply not have declared them to the State. "[C]onduct of employees of the crime laboratory, which is lacking in due diligence, constitutes actions on the part of the State." State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001). The Wake court found that the State's failure to commit adequate resources to the investigation to meet the speedy trial deadline was akin to the "docket congestion" found to be an impermissible excuse in State v. Mack, 89 Wash. 2d 788, 576 P.2d 44 (1978). "Government misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within [the] standard." State v. Sulgrove, 19 Wash. App. 860, 863, 578, P.2d 74 (1978); State v. Dailey, 93 Wash. 2d 454, 457-58, 610 P.2d 357 (1980). A prosecutor's error in failing to provide records is not harmless beyond a reasonable doubt. State v. Getty, 55 Wash. App. 152, 777 P.2d 1 (1989). Failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice; In order to invoke this rule, a defendant must prove, by a preponderance of the evidence, the

State has failed to act with due diligence and also, the State's delay compels him or her to choose between the right to a speedy trial and the right to effective assistance of counsel. State v. Ralph Vernon G., 90 Wn. App. 16, 21-22, 950 P.2d 971 (1998); State v. Earl, 97 Wn. App. 408, 984 P.2d 427 (1999).

Mr. Grenning was essentially faced with a Hobson's Choice, (State v. Micheilli, 132 Wn.2d 229, 937 P.2d 587 (1997); State v. Ramos, 922 P.2d 193, 83 Wash. App. 622 (Wash. App. Div.1 09/16/1996)), when the State submitted its tardy request for continuance on May 30, 2002. Even more inexcusable was the State's having requested more time for an investigation that was already complete with respect to the images of R.W. presented at the trial. The State pled a lack of resources to complete an investigation in three months, when it completed its investigation into the alleged victim R.W. not two weeks after that three-month period. CP at 6-38. This was done to gain the tactical advantage over the defense by creating an indefinite investigation limbo that lasted two years and subjected Mr. Grenning to further prosecution brought by the State's disingenuous May 30, 2002 motion. State v. Sherman, 59 Wash. App. 763, 770-71, 801 P.2d 274 (1990) agrees and concludes:

> Nor do we find persuasive the State's argument that the defendant should have sought a continuance to allow time for the State to produce the records. Here, the speedy trial expiration date had been extended a total of seven times, and was scheduled to expire again on the day the case was dismissed. To require Mead to request a continuance under these circumstances would be to present her with a Hobson's Choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense. [Id at 32]

It is true that "dismissal of charges is an extraordinary remedy[;] It is available only when there has been prejudice to the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." State v. Baker, 78 Wash.2d 327, 332-33, 474 P.2d 254 (1970). However, the prejudice incurred by Mr. Grenning in waiting two years to go to trial due to the State's negligent misconduct in disclosing the state of its investigation, and the inexcusably late timing of its declaration of lack of resources to gain continuance, is more than sufficient to meet the preponderance of evidence doctrine. "If congestion at the state crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem." State v. Wake at 475. Mr. Grenning was clearly prejudiced by this Hobson's Choice between effective counsel and speedy trial, and the appellate court should reverse and dismiss his charges.

3. THE STATE FAILED TO PRODUCE EVIDENCE IN A TIMELY MANNER, IF AT ALL

The United States Constitution protects citizens against the deprivation of liberty without due process, Fifth Amendment, enforced upon the states through the Fourteenth Amendment. The Superior Court Criminal Rules of the State of Washington command the prosecuting attorney to disclose all documents and reports to the defense no later than the Omnibus hearing. CrR 4.7(a). CrR 4.7(c)(1) also commands the disclosure of relevant material and information associated with searches and seizures and CrR 4.7(h)(2) provides that the prosecuting attorney has a

continuing obligation to disclose evidence if it should arise later. Washington's Rules of Professional Conduct prohibit a lawyer from "unlawfully obstruct[ing] another party's access to evidence." RPC 3.4(a).

Since a computer is "the modern day repository of a man's records, reflections, and conversations," State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002), it is incumbent on the State to show that the search of Mr. Grenning's computer was particularized and governed by a controlled and careful documentation of the entire search process. With this in mind, defense submitted two Omnibus Applications for Discovery, CP at 04/10/02, 04/26/02, which requested, among other things, the logs, records, memoranda, reports, notes and indexing material produced as a result of this computer search. The State's response was that it had already provided the information, or that it didn't understand what the defense was asking for. CP at 04/15/02. The State failed to disclose the information the defense requested and begged ignorance throughout much of that response, despite the requests being clear and specific. Discovery Abuse is defined as "the failure to respond adequately to proper discovery requests. [subnote]: ....[also] as by giving obviously inadequate answers..." Black's Law Dictionary- Seventh Edition- 2003.

Defense indicated, following colloquy by the State, that there was obviously information which the State had not disclosed regarding the investigation of a second victim, and made a formal request for that information July 25, 2003. RP (07/25/03) at 26. The defense further asserted on August 1, 2003 that there were affidavits connected to the allegations of a second victim and subsequent search

warrant which the State had not disclosed, and the State vaguely assured the court that defense had all the affidavits. RP (08/01/03) 11-12.

In the midst of trial, defense put on record the State had still failed to provide the complaint for the warrant, and again made a demand for it. RP 420. The State inferred, in error, that defense counsel should have requested it before, when the record clearly shows a request was effected several times. In scampering to explain to the court the sequence of investigation supporting the charges related to B.H., the State invoked the term "Operation Verona" which has never appeared in any disclosure to the defense. RP 421. The State finally disclosed the affidavit later that day, whereupon defense learned of a quantity of material sent from Australia for which it had never been given notice. RP 440. Defense counsel asked to view the material and, against the State's attempt to merely summarize it, Judge Orlando asks the State to make available Detective Voce and the material so defense could review "Operation Verona." RP 421, 440.

It is clear why the State was reluctant to disclose the Operation Verona booklet, where defense immediately recognized no proper chain of custody, RP 613, and Detective Voce unraveled the discrepancies of how the package was lost in an office for a length of time. RP 615-16. Although the State argued the matter to be irrelevant because the material in prosecution was found on the defendant's computer, RP 616, the Declaration for Determination of Probable Cause filed on October 28, 2003, CP at 581-591, clearly states, "the police in Australia were able to recover internet 'chats'" from the computer of an unnamed suspect in Australia,

and that "the Australian authorities [] provided the Tacoma Police Department with a number of 'chats.'" Where Voce entirely failed to produce any evidence of the 'chats' having come from the search of the defendant's computer, nor any log supporting this assertion, there is clearly a serious violation of disclosure and an utter mismanagement of evidence. Detective Voce could have submitted the chats from Australia and there is no evidence to exculpate him from having done so, reinforcing the total lack of accountability of the State's investigation.

Defense remained concerned of the lack of accountability and submitted a letter in court on May 7, 2004 asking the State to produce the EnCase[2] audit log or any logs or notes associated with the computer search. RP 4-6, CP at 05/07/04. The State finally produced five pages of ministerial handwritten notes that did not meet the criteria of the request, which were entered as exhibit 5 in pretrial motions and 144 during trial. Detective Voce declared that nothing else tracked or logged the investigation of the computer, RP 86-87, 105-106, 692, even though he claims hundreds of hours of work went into his investigation. RP 690. He also admits he made no log of his search of the many additional disks and CDs seized. RP 92-93. Defense continued to make it clear throughout the trial that complete disclosure had not been made. RP 102, 267-268.

Having spoken with an expert in computer investigation, defense was given to understand that the EnCase software "automatically defaults into basically a history of everything the person has done while they use this software," RP 9-10, which is

[2] EnCase is the software Detective Voce relied on for the computer search.

additionally substantiated by the manufacturer's claim of "Book Marking" capability. See: Declaration from "Guidance Software" herein attached. The computer investigation industry refers to this as an "Audit Log" which is what defense requested in its letter. RP 4-6. The following is an excerpt from The Champion, 27 Champion 18- National Association of Criminal Defense Lawyers, Inc., by Amy Baron-Evans, 2003:

> The program used to make and restore images [during a computer investigation] should have an audit function that shows every operator entry and its date and time, and also errors encountered in the process. As a result, the audit log can tell you how many mirror images were made and when, and how many were restored to a hard drive and when. The audit function is a default feature that runs automatically on most forensic imaging software including SafeBack™ and EnCase™ []. If the audit log does not exist, the agent must have intentionally rejected it.

The Department of Justice directs computer analysts to "document all the steps taken in the search," and keep "a careful record so that their efforts can be recreated in court." Federal Guidelines for Searching and Seizing Computers, 1994, Part IV (G)(3).

Detective Voce declares that EnCase cannot record such investigative activity and, against the manufacturer's claims, can't keep logs of dates and times of searches. RP 115-16, 697. He further cannot produce or will not produce any log of having taken the material to Detective Marney in Oregon whom he sought for considerable technical help, an individual the State, despite ample opportunity and necessity to disclose, did not. RP 127, 514, 641. As a result of this failure to acknowledge or produce logs prudent to such an investigation, Detective Voce

cannot even recall the date in which the assistance of Detective Marney was sought. RP 133-34.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). "There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." United States v. Agurs, 427 U.S. 97, 49 L. Ed.2d 342, 96 S. Ct. 2392 (1976). Impeachment evidence as well as exculpatory evidence falls within the Brady rule. Giglio v. United States, 405 U.S. 150, 154 (1972).

Even what little handwritten notes were provided illustrate evidence of perjury, having shown that the defendant's computer was mirrored on March 19, 2002, contrary to Voce's sworn affidavit in support of the State's Response to Motion to Suppress which declares it occurred on March 15, 2002. CP at 631-651. The difference in dates was the difference between the operation having been done before or after the search warrant expired, and thus its lack of disclosure would in all probability have had a considerable effect on the outcome of the first motion to suppress evidence. RP (09/18/02) 1-88, CP at 91-100. The Supreme Court has recognized that a prosecutor's continued failure to disclose specifically and repeatedly requested evidence will lead the defense to believe it does not exist and thus make pre-trial and trial decisions based on that, and reviewing courts must not

rule out the probability of a different course in trial had the defense not been misled. United States v. Bagley, 473 U.S. 667, 87 L. Ed.2d 481, 105 S. Ct. 3375 (1985). Had the State disclosed the log, exhibit 5/144, before September 18, 2002, (the suppression hearing), instead of 18 months later, or had the State produced any reasonable record of Voce's lengthy investigation, defense might have been successful in impeaching the Detective, and the suppression hearing may have turned out differently.

Evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, State v. Benn, 120 Wn.2d 631, 650, 845 P.2d 289 (1993). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995) [emphasis added].

The ability to impeach Detective Voce's testimony and investigation was instrumental to the case as in Davis v. Alaska, 415 U.S. 308, 318 (1974):

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross examination which "'would be constitutional error of the first magnitude and no amount of showing

of want of prejudice would cure it." Brookhardt v. Janus, 384 U.S. 1, 3.' Smith v. Illinois, 390 U.S. 129, 131 (1968)

This 'reasonable probability' is no mere harmless error. This case hinges on copious amounts of data extracted from the defendant's computer where no record of this search or investigation, commensurate to the scope of reconstructing the search, was disclosed.

In addition, the State failed to disclose the key witness, Detective Marney, whose potential testimony had more than a 'reasonable probability' of helping the defense reconstruct this extensive and yet unsubstantiated search. The State waited until the middle of Mr. Grenning's trial to make any disclosure of an entire investigation named "Operation Verona" from which evidence potentially came, and from whose unsubstantiated chain of custody sprung the means for new charges and subsequent searches of the defendant's computer. Defense acted in good faith, continually making timely requests for such information, and yet being surprised by it at the last conceivable moment in the trial. The court "preserved" defense's objection, RP 422, but ultimately allowed the State to proceed with it. It is true that "'surprise' is not a basis for excluding relevant evidence under ER403 unless the opposing party will suffer unfair prejudice," Lockwood v. AC&S, Inc., 44 Wn. App. 330, 363, 722 P.2d 826 (1986), but here it is very clear that what the State accomplished prejudiced the defendant.

"The failure to disclose evidence deprives defense the opportunity to effectively prepare for trial and to design an intelligent trial strategy." [practice commentary]

United States v. Alvarez, 987 F.2d 77, 84-86 (1st Cir. 1993) cert. denied, ___ U.S. ___, 114 S. Ct. 147 (1993); United States v. Hemmer, 729 F.2d 10, 13 (1st Cir.) cert. denied, 467, U.S. 1218 (1984); United States v. Gladney, 563 F.2d 491, 494-95 (1st Cir. 1977). There is no reason for the State to have withheld or denied the defense logs of their investigation, potential witnesses of instrumental importance, or entire 'operations' upon which part of Mr. Grenning's convictions are founded. This denied Mr. Grenning his Sixth Amendment right to fair trial where the State violated with impunity the court's express rules for discovery. CrR 4.7. Mr. Grenning's convictions should be reversed and remanded for new trial.

4. DETECTIVE VOCE'S INVESTIGATION WAS POORLY EXECUTED, SCARCELY DOCUMENTED AND WROUGHT WITH ASSUMPTIONS AND ERRORS.

The manner in which Detective Voce, in partnership with the State, carried out his investigation is so faulty and unsubstantiated, and its elements so rife with inexcusable error, the trial court should have dismissed him as an insufficient expert. Submitted for review are seven specific areas, among many, which illustrate Detective Voce's investigation as lacking in the basic tenets of an appropriate and widely accepted form of computer examination.

a. No understanding of computer system searched.

Detective Voce engaged in an investigation of an Apple Macintosh computer system where he admits he has little to no understanding of its workings. RP 86. It would be poor taste to criticize the State's investigator on ignorance of a particular

subject, however, in the absence of knowledge, it should have been incumbent on the officer to immediately seek assistance from someone knowledgeable. Detective Voce did in fact come to this realization, but not until "way after" considerable investigative techniques were employed which were not intended for the particular computer. RP 133-134.

Where Detective Voce can't be sure how to apply his software tools correctly and thus prevent tampering with the file structure information, by the time he handed Detective Marney the hard drives, it was tantamount to asking him to identify the various gardens a pile of vegetables were removed from. It is unreasonable to engage in an investigation one is not qualified to perform.

b. Failure to particularize search.

Though Detective Voce knew that he was primarily in search of images, he testified to having felt the right to search every file on Mr. Grenning's computer. RP 96-97, 123. He claimed a lack of directory structure, but when shown a directory fragment produced by his EnCase software whose path read "Archive," "Neil's Folder," and "Pictures I Took," (defense exhibits 9, 10), he declines to agree with what his own software purports it to be. RP 117-118. The investigator would be disinclined to concede the existence of any from of directory or file name structure where the rationale for searching every file because it may not be named what it really is, doesn't qualify until the investigator has first determined that key word searches have not yielded any evidence. United States v. Carey, 172 F.3d 1268, 1274 reh'g denied, 172 F.3d 1268 (10th Cir. 1999) at 1274-75. It is widely

accepted that keyword searches commensurate to the particularity of the investigation are to be utilized to avoid a search beyond the permissible scope. United States v. Maxwell, 45 M.J. 406, 420 (C.A.A.F. 1996).

It is clear Voce could have used targeted searches where he testifies to having done so with the parameter "Jason" much later in the investigation. RP 659. Rather, it would appear he executed his investigation backwards, searching every file, and later trying keyword searches. RP 96-97, 705-706. This approach does not pass the litmus for a proper forensic examination his credentials would otherwise suggest and thus he failed to protect Mr. Grenning's Fourth Amendment rights to privacy.

c. Failed to test the computer clock.

In such an investigation the importance of establishing when the events associated with the images took place makes it necessary to first establish if the computer's clock is set correctly. Detective Voce accepts this methodology but concedes he didn't bother to check Mr. Grenning's computer to determine this, RP 701, and this logical step was irrelevant because he admits he doesn't know, nor did he bother to find out, whether Macintoshes store such date and time information. RP 702. It is unreasonable for Detective Voce to accept the forensic tenets of establishing date and time of events, while totally disregarding the logical steps to acquire them.

d. Lack of logs and records to substantiate investigation.

Detective Voce claims to have spent in excess of 200 hours combing through the information on Mr. Grenning's computer, RP 690, but can only produce five

handwritten pages of ministerial notes to provide a foundation for this extensive and expansive search. Defense exhibit 5/144. It is clear the State is concerned about Detective Voce's credibility where it rushes to propose five police reports produced by the detective to bolster the idea there might be more. RP 713-714. The State quickly withdrew its intent to submit them as evidence or allow the jury to see them when it recognized defense was right in pointing out that there was no information in them relevant to documenting times and dates of searches. RP 714-15. Defense exhibit 5/144 represents the entirety of Voce's investigation documentation according to his claims. RP 92-93, 105-06, 123, 691.

Appellant has already argued the inherent nature of EnCase to produce a far more substantial record of an investigator's search through the use of "Book Marking" and an "Audit Log," and it therefore becomes prudent to point out that defense was never allowed access to the original mirrored drives and only select evidence burned onto a CD was presented at trial. RP 663. Wholesale copying onto CDs or magneto optical disks does not serve a necessary forensic purpose when it is done in addition to making a mirror image, because the image preserves both the original evidence and gets the data into searchable form. United States v. Triumph Capital Group, Inc., 211 F.R.D. 31 (D.Conn. Nov. 4, 2002). The procedure lends itself to being used for the illegitimate purpose of hiding the records of the investigator's search.

Due to the Detective's failure to keep records of his investigation, he is unable to even establish from which of three hard drives his first discovery of child

pornography came from. RP105. An equivalency may be drawn to a blood analyst finding the blood of a murder victim on a defendant's shirt, but not being able to identify which shirt in the wardrobe was sullied by it. Detective Voce's record keeping is so poor that, not only can he not provide any record of having searched the digital memory cards, he's not even sure if they were seized. RP 90.

e. Did not filter out duplicate images.

In a preview outside the presence of the jury June 15, 2004 of the 300 images the State wished to present, RP 449-71, both the Honorable Orlando and the defense pointed out there were considerable duplicates. RP 458, 464. Judge Orlando presented a lengthy list of images he felt were definitely duplicitous, with the disclaimer that there might be more. RP 464-66. The court's ruling found 82 of the 300 to be repeated images.

Appellant is aware that it is arguable that Detective Voce, as opposed to counsel for the State, is not ultimately responsible for screening the images for obvious duplication, but Detective Voce should surely have realized, in selecting the images and burning them to disk, that nearly a third of them if not more, were duplicates. However, the actions of the investigative party are intrinsically a component of those of the State. State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001). This failure to screen the images reflects the arbitrary and careless handling of evidence by Detective Voce.

f. Failure to maintain a chain of custody.

Defense counsel, in reviewing Detective Voce's report and the police reports, determined there was a broken chain of custody for the material coming from Australia as to who received the package and what happened to it before acquired by Voce. RP 614. Detective Voce recalled that twelve months prior it had been lost in the office of the exiting Assistant Chief, Woodard, and was discovered some time later and routed to him. RP 615-16. It is true that the State need not show an unbroken chain of custody, however the possibility of it having been tampered with weighs against its admissibility. State v. Piccard, 90 Wn. App. 890, 954 P.2d 336 (1998). Where there is discrepancy as to where the 'chat' message, (state's exhibit 140), came from-- either from Australia (Declaration and Determination for Probable Cause, CP at 581-91), or from the defendant's computer, (RP 671)-- it becomes questionable what kind of scrutiny the investigators gave this information, especially in reviewing the State's assessment of how the images correlated:

> The Court: So are these photos that you have marked here also contained in this Operation Verona book?
>
> Mr. Birgenheier: I don't know. I don't want to say for sure. I don't want to say for sure—if I remember correctly. I don't want to say for sure. I can have Detective Voce bring down the book.
> [RP 421]

Where the State refrained from disclosing the material from Australia until the middle of trial, RP 440, there is a likelihood of it having been compromised or fabricated while floating around indiscriminately in the police department. This negligent mismanagement of evidence severely prejudiced Mr. Grenning's ability

to reconstruct the investigation and prepare a defense strategy commensurate to a fair trial.

g. Misrepresentation to the jury.

In the aforementioned 'chat' messages, State's exhibit 140, one of the screen names is "Fotokind"[3] which the State continually asserts is Mr. Grenning. CP at 581-91, RP 665. When defense objected for grounds of foundation, RP 665, 668, the court performed a foundational voir dire outside the presence of the jury. In this voir dire, Detective Voce testifies the chat message says "he just got out of grad school," RP 666, which correlates with statements attributed to "Fotokind" in exhibit 140. However, in presence of the jury Detective Voce testifies the author of the chat message says he "had just gotten out of PLU" and affirms he knew that Mr. Grenning had graduated from PLU.[4] RP 669.

Defense did not need to articulate a specific objection at this point, counsel having already made a prior "general foundation objection." RP 668. This misstatement of the evidence by Detective Voce to the jury not only prejudiced Mr. Grenning, it illustrated the impunity with which the State and its investigative body violated the sanctity of evidence, offering opinion as if it were fact.

In summation, Detective Voce engaged in an investigation he was not qualified to work on and, despite his extensive resume of courses and qualifications, RP 84-

[3] Exhibit 140 illustrates that the username is "Fotokind," however the court reporter stenographically committed the phonetic "Photokind."
[4] PLU- Pacific Lutheran University

85, 443-445, consistently failed to follow proper computer forensic examination procedures, conveniently leaving no record substantiating dates or times of any of his searches. He maintained no discovery/search log and refuted the EnCase software manufacturer's assurance of the program's logging and audit/Book Marking features, these being crucial to reconstructing his investigation for trial purposes. The trial court has a duty to ensure that scientific testimony is not only relevant, but reliable. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Supreme Court addressed this concern in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999):

> The district court did not doubt Carlson's qualifications,... [r]ather, it excluded the testimony because, despite those qualifications, it intuitively doubted, and then found unreliable, "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis."

Detective Voce exercised inexcusable mismanagement of evidence and continually corrupted its transmission to the jury, claiming he "did the best" that he could. RP 142, 143. Claims by the government computer experts that they do not have the software or skills to perform a targeted search are not only objectively unreasonable, but may support an argument that their testimony be excluded. Kumho Tire Co. v. Carmichael, at 153-54. Detective Voce's careless investigation seriously prejudiced Mr. Grenning's right to a fair trial, and his convictions should be reversed and remanded for a new trial.

5. THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT IN THE PRESENTATION OF EVIDENCE AND THE UNIT OF PROSECUTION.

The State charged Mr. Grenning with 72 crimes involving two victims relying primarily on photographic evidence said to have been retrieved from Mr. Grenning's computer. The State utilized this evidence in a manner to prejudice Mr. Grenning both in the quantity of events charged and the mischaracterization of evidence or lack of proof to support their charges. Identified are four areas of prosecutorial concern.

a. The State abused the sequence of evidence to support overcharging of child molestation and rape of a child.

Detective Voce testified that the images retrieved were in unallocated space, with no directory, and therefore all his software could do was retrieve the material randomly and assign numbers to the files. RP 110-111, 114-115. In this manner, the State cannot contend that the way EnCase enumerated the images represents an accurate sequence of events, and by this latitude, the State abused the order of evidence to overcharge Mr. Grenning.

Regarding the victim R.W., the State assigned fifteen counts of Rape of a child in the first degree (RCW 9A.44.073) and four counts of child molestation in the first degree (RCW 9A.44.083) to images 15 through 259 from a CD burned by Detective Voce. RP 520. To understand the issue under examination, it is essential to review how the charges were assigned and to which images. The following chart is extrapolated from the record. RP 452-61.

COUNT	CHARGE	ASSOCIATED IMAGES	EVENT
I	rape	(none)	n/a
II	rape	15	oral/genital contact
IV	rape	18, 26, 28, 30	penetration w/white probe
VIII	molestation	53, 56	genital/genital contact
IX	molestation	60	genital/genital contact
XI	rape	100, 101, 105, 106	oral/genital contact
XIV	molestation	107, 108	oral/genital contact
XVI	rape	114, 115, 117, 118, 119	penetration w/enema
XVIII	rape	124	penetration w/white probe
XIX	rape	125, 126	penetration w/white probe
XXI	rape	140	penetration w/finger
XXV	rape	203, 205	oral/genital contact
XXVI	rape	204	oral/genital contact
XXVII	rape	207, 208	penetration w/black probe
XXX	rape	226, 227, 228	penetration w/enema
XXXII	rape	229, 230	penetration w/finger
XXXIV	molestation	(none)	n/a
XXXVI	rape	235	penile/anal contact
XXXVIII	rape	252, 253, 254, 255, 256, 258, 259	penetration w/purple probe

There are several indications that the images are not sequential representations. (1) Nearly all the charges to which numerous images are assigned appear to skip over irrelevant images. (2) In reviewing all the images, the court encountered numerous repetitions of the same event being displayed twice. RP 458, 464-67. The State offers no valid evidence that count II, XI, and XXV are not the same contiguous oral/genital contact, or that count IV, XVIII, and XIX are not also the same contiguous event simply repeated or parsed out among the 300 random images. In fact, due to juxtaposition of XVIII and XIX, the jury assumed it to be the same event and found Mr. Grenning not guilty of the latter. The record further shows that counts I and XXXIV had no image associated with them and were likely proffered

to confuse the jury into associating them with other images already charged, a violation of Mr. Grenning's Fifth Amendment double jeopardy rights.

The State also tried to infer at various times that the victim R.W. was obviously sexually assaulted on different days because the evidence shows R.W. in two different sets of clothing. RP 959, 1007. However, the evidence only shows two images of R.W. in clothing, and in neither of them is he engaging in any illegal activity. Image 1, State's exhibit 23; Image 4, State's exhibit 24. The State presents no evidence that either of these two harmless photos was a precursor to a different sequence of charged events. In the end, the State has somehow charged Mr. Grenning nineteen counts of rape and molestation when the evidence only points to eight discernable events.

Regarding the victim B.H., the State charged two counts of attempted rape of a child in the first degree (RCW 9A.44.073 with RCW 9A.28.020), two counts of rape of child in the first degree (RCW 9A.44.073) and two counts of child molestation in the first degree (RCW 9A.44.083) to images 36 through 59 from a CD burned by Detective Voce. RP 663. Again, the following chart extrapolates from the record which charges were assigned to which images. RP 474-76.

COUNT	CHARGE	ASSOCIATED IMAGES	EVENT
LXV	molestation	38	penetration w/finger
LXVI	rape	39, 40, 41, 42, 43, 44, 45, 46	penetration w/white probe
LXVIII	molestation	52	genital/genital contact
LXIX	att. rape	55	penile/anal contact
LXX	rape	56, 57	penetration w/finger
LXXI	att. rape	59	penile/anal contact

Again, the sequence is partitioned by irrelevant images requiring numerous removals, RP 477-480, which conclusively point to the argument the images are not a sequential representation. There is no evidence that count LXIX and LXXI are not the same act, nor that count LXV and LXX are not the same contiguous act. Here the State charged six counts where only 4 discernable events were depicted.

The State again tried to introduce erroneous evidence to argue for the partitioning of charges, the 'chat' messages, States exhibit 140, which appellant has previously argued lack proper foundation. RP 638-639, 664-665, 942, 1004, 1016. The argument is irrelevant, however, where the State did not charge Mr. Grenning accordingly. The jury did not find him guilty of raping and molesting R.W. on several different days nor of raping B.H. over the course of several hours. The charging documents for both cause numbers point to a large and inconclusive period of time where no partitioning, for purposes of Same Criminal Conduct, RCW 9.94A.400, are alleged. CP at 325-353.

Circumstantial and direct evidence are equally reliable and credibility determinations rest solely with the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794, P.2d 850 (1990); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The 'trier of fact' is the jury and "under the Due Process Clause of the Fifth Amendment and notice and jury trial guarantee of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227 (1999).

Even so, separate incidences giving rise to separate convictions may still have been committed at the same time and therefore encompass Same Criminal Conduct. State v. Young, 97 Wash. App 235, 984 P.2d 1050 (1999). Absent a jury determination of separate times there is no standard of proof but to concede same time and same criminal intent. State v. Dolen, 921 P.2d 590, 83 Wash. App. 361 (1996); State v. Collins, 48 Wash. App. 95, 737 P.2d 1050, review granted, reversed on other grounds, 110 Wash.2d 253, 751 P.2d 837 (1987). The courts have not upheld equal protection, with varying decisions that allow two drug sales in the span of twenty minutes to encompass Same Criminal Conduct, State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997), while denying the statute's provisions for nineteen crimes committed in forty minutes, State v. Brady No 29766-3-II (Wash. App. Div.2 05/ 04/2004). The argument posed in the Brady court, that the defendant had time to pause and reflect on his criminal conduct while taking a photograph roughly every two minutes, does not correlate with the interpretation that in the span of ten minutes, Ms. Porter did not pause and reflect on her criminal activity. The rationale is equally unsupported by assuming that, had Mr. Tili taken photographs while simultaneously raping his victim, that his criminal intent might have suddenly changed. State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). Sexual exploitation of a minor involves sexual motivation and confirms the Same Criminal Intent of the crimes it's intertwined with, and therefore meets the statute defined in RCW 9.94A.400.

For the State to mislead the jury and the court with such arguments, while not properly submitting them in the charging documents, was to subvert the jury

process with unproven facts. The State manipulated the evidence and order of presentation to prejudice Mr. Grenning, charging him a total of 25 crimes of rape and molestation where only 12 discernable events were portrayed. This is prosecutorial misconduct and a violation of RPC 3.8(a): "The prosecutor...shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

b. The State improperly charged assault without support of evidence.

The State charged Mr. Grenning in count XL with Assault of a child in the second degree with sexual motivation, supported by image numbers 263-270. The images show the alleged victim R.W. with what the State has referred to as a "black strap around his chest with yellow foam rubber" and an "electrical clamp yellow foam rubber" attached to his genitals. RP 463. RCW 9A.36.021(1)(f) and 9A.36.130(1)(a) provide that "A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person: (a) commits the crime of assault in the second degree as defined in RCW 9A.36.021, against a child" – "[9A.36.021](1)(f) with intent to commit a felony, assaults another."

The key word is "intent" where the State must show through the evidence what the defendant 'intends' to do through the actions visible or alleged. The State's allusion to "electrical clamp[s]" is not supported by the evidence presented. There is no testimony as to what the devices were, or what, if any, inducement they

might have had on R.W. RP 600-604. The State did not offer any testimony from R.W. to support 'intent,' and anything else is speculation unworthy of the proof "beyond a reasonable doubt." R.W. does not exhibit any signs of discomfort indicative of the State's allusion, and in fact appears to be laughing in image 269 and 270. The State may allege that the photographing of a minor with unknown paraphernalia attached to his genitals is sexual exploitation as defined in RCW 9.68A.040, but absent allegation of intent towards an unalleged felony, or testimony that more clearly defines the action exhibited, the State has failed to meet the burden of proof for assault of a child in the second degree, and the State's allegations constitute prosecutorial misconduct.

c. The State overcharged exploitation of a minor.

The State charged Mr. Grenning twenty-two counts of sexual exploitation of a minor (RCW 9.68A.040) with respect to the alleged victim R.W. and four counts with respect to the alleged victim B.H. CP at 325-353. The counts are all supported by photographic evidence. In a case charging multiple counts of sexual exploitation of a minor based on posing children for many photographs, the proper "unit of prosecution" is per photo session per minor involved in each session, not each photograph. [West's annotated, 2002] State v. Root, 141 Wn.2d 701 9 P.3d 214 (2000). Detective Voce could not provide information lending to a date or time related to any of the photographic evidence, RP 128, 701-702, and the State does not contend the images related to B.H. were any more than one photo session. Cumulatively, the State charged twenty-six counts of sexual exploitation where

evidence of only two photo sessions involving two different victims existed, in violation of State v. Root and RPC 3.8(a).

d. The state did not prove intent.

Detective Voce testified that somewhere between 35,000 and 40,000 pornographic images were retrieved from Mr. Grenning's computer, RP 517, from which the State selected twenty images to support charges XLIII through LXII. The quantity of images said to have been possessed by Mr. Grenning is not unusual considering a computer "can hold so much information touching on many different areas of a person's life," quoting United States v. Carey, 172 F.3d 1268, 1274 (10th Cir), reh'g denied, 172 F.3d 1268 (10th Cir. 1999) at 1274-75. The purpose for charging so many, and then being allowed to 'frame' the twenty images with an additional forty, RP 492, would be to overwhelm the jury into an emotional decision versus an intellectual one. RP 447.

Although the courts have ruled that downloading of child pornography does not meet the same criminal conduct statute where the images depict a different victim, State v. Ehli, 115 Wash. App. 556, 62 P.3d 929 (2003), there is no controlling factor for whether the State should charge just one or all 35,000, and the State has opted to charge only one count in State v. French, (Pierce County, 2004) despite hundreds of additional images. The State argued that the probative value was to prove sexual motivation, RP 490, but the legislature does not inform the court that quantity determines motive, and the State's indiscriminate latitude is unreasonable.

"If the legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity." State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). It is furthermore unreasonable to imbue an objective determination of guilt with a subjective quantifier to increase the punishment, especially where the court admits that it has no idea what Mr. Grenning's motive is. RP 1031. A court should not base a decision to increase the punishment meted out for a charge on an unproven fact. State v. Morreira, 107 Wash. App. 450, 27 P.3d 639 (2001). The State did not provide evidence in support of sexual motivation, regardless of quantity, and unreasonably charged Mr. Grenning using untenable subjective determinations grafted onto objective determinations already taken into account by the legislature. State v. Mulligan, 87 Wash. App. 261, 941 P.2d 694, review denied, 134 Wash. 2d 1016, 958 P.2d 317 (1997). This arbitrary charging is objectively unreasonable and arguably constitutes prosecutorial misconduct.

The State has egregiously overcharged Mr. Grenning more than twice as many rape and molestation charges as there was evidence to support, assault of a child where evidence did not support it, thirteen times as many charges of sexual exploitation than there was evidence of photo sessions to support, and alleged sexual motivation with no evidence of motivation. A claim of prosecutorial misconduct requires showing of impropriety by the State and resulting prejudice. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). There is no question of

the resulting prejudice to Mr. Grenning where the cumulative charges and images were used as in inflammatory and unreasonable tool on the jury, who in just one instance found Mr. Grenning guilty of three counts of rape stemming from the repetitive photographic evidence of one act. The trial courts have been warned in State v. Crenshaw, 98 Wn.2d 789, 659 P.2d 488 (1993):

> We adhere to our previous statement that a bloody, brutal crime cannot be explained to a jury in a lily-white manner... Nevertheless, we take this opportunity to warn prosecutors that we look unfavorably on the admission of repetitious inflammatory photographs. Prosecutors as well as trial courts must exercise their discretion in the use of gruesome photographs... Prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary.

This cumulative, willful and zealous overcharging by the State violated Mr. Grenning's Fifth Amendment double jeopardy protections and his Sixth Amendment right to a fair trial. His charges should be reversed and remanded for a new trial.

6. THE STATE PREJUDICED MR. GRENNING'S RIGHT TO A FAIR TRIAL BY MAKING UNAUTHORIZED EXTRAJUDICAL STATEMENTS TO A SATURATED MEDIA ENVIRONMENT.

The Rules of Professional Conduct in the state of Washington forbid a lawyer to make extrajudicial statements to the relative media about "the character, credibility, [or] reputation" of a defendant, "the performance or results of any investigative examination of test such as...a laboratory test,"

"any opinion as to the guilt or innocence of any suspect or defendant," and "information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial." RPC 3.6(I)(1),(3),(4) and (6). The prosecutor also has an obligation to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement" as outlined in RPC 3.6. RPC 3.8(e).

Nevertheless the State, through their investigators and prosecutor, disclosed numerous unauthorized opinions and laboratory examinations to the media. In KOMO 4 News's April 3, 2002 web publication (see attached article, 04/03/02), the police, and specifically Jim Mattheis, disclosed that a forensic computer evaluation on Mr. Grenning's computer had yielded "3000 sexually explicit child pornography pictures" and that "there are signs that Grenning may be in some of those," in violation of RPC 3.8(e) and 3.6(I)(3). The same information was disseminated to the Tacoma News Tribune, (see attached article, 04/04/02) where Detective Ed Baker is the proponent of the unauthorized extrajudicial statements. The police also described business cards and photography consent forms found at Mr. Grenning's residence, neither of which were authorized to be seized, nor which were taken into custody. This particular dissemination is a violation of Mr. Grenning's Fourth Amendment right to privacy.

When the State re-arraigned Mr. Grenning, it released an image seized from his computer to Komo 4 News, who placed it in another inflammatory article characterizing Mr. Grenning as a "Dangerous Sex Predator," (see attached article, 06/20/02), before any CrR 3.6 hearings had been conducted to determine if the evidence was admissible. In fact, the image released to Komo 4 News was later found to be too prejudicial and excluded by the Honorable James Orlando on June 15, 2004. RP 466, Image number 292, 293-ref. RP 463. Again, Jim Mattheis is quoted saying Mr. Grenning is "an extreme predator" and declares he "continually violate[d]" the victim, a determination of guilt which is solely the province of the jury. Detective Voce's opinion is quoted, "These are probably some of the worst images I've seen" in violation of RPC 3.8(e) and RPC 3.6(I)(3).

The State severely exceeded the province of the jury when deputy prosecutor Hugh Bergenheier asserted, "I want to make sure he's punished for what he did," in a Tacoma News Tribune article published October 29, 2003, (see attached article, 10/29/05). The police also released the results of an investigation in Australia prior to a finding of admissibility, repeatedly quoting a chat message as authored by the defendant, where the trial court later determined its origins were only speculative opinion. RP 667. The State also offered no evidence at trial to support the assertion released to the media that "NyQuil" was used to drug one of the victims. This clearly was meant to instigate taint to a jury pool.

Though the court found no prejudice in evidence released to the media in Stroble v. California, 343 U.S. 181 (1952), it was clearly pointed out that a hearing had already determined the evidence to be admissible. The court's aversion to the release of evidence and results of tests prior to such a hearing can be found in State v. Stiltner, 80 Wn.2d 47, 491 P.2d 1043 (1971). In contrast to the unpublished portion of the decision in State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000), the images in Mr. Grenning's case were not merely seized photos, but the results of a forensic computer examination, arguably no different from a laboratory test.

Where trial related publicity creates a probability of prejudice to the defendant, the defendant is denied due process of law if the trial judge does not take steps sufficient to ensure a fair trial for the defendant. State v. Stiltner; Shepperd v. Maxwell, 384 U.S. 333, 350, 86 S. Ct. 1507, 16 L. Ed.2d 600 (1966). Appellant concedes that a change of venue pursuant to CrR 5.2 was never requested, despite notification provided in defense's Second Omnibus Application, CP at 04/26/02, and that the length of the time until trial, the size of the community, and the results of the jury voir dire would not compel a court to a finding that these four specific articles prejudiced the defendant. State v. Laureano, 101 Wn.2d 745, 754, 682 P.2d 889 (1994). However prejudice to a defendant by such extrajudicial statements is very difficult to prove, Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1989), and the State's direct involvement in pre-trial publicity is a

serious factor in determining whether there is "presumed prejudice" where the State has an important responsibility in avoiding conduct which could reduce the likelihood of a fair trial. State v. Crudup, 11 Wash. App. 583, 587, 524 P.2d 479 (1974); State v. Wixon, 30 Wash. App. 63, 631 P.2d 1033 (Wa. App. 08/03/1981).

In lieu of the particularly inflammatory and violative statements police, investigators, and the prosecutor made to various news media outlets in Mr. Grenning's case, the appellant asks the court to consider whether the denial of relief has any compelling effect on State agencies to refrain from doing so where they are aware of the almost impossible burden of proving prejudice. The State willfully violated the Rules of Professional Conduct through their extrajudicial statements to the media in this case, and they will no more disavow this unscrupulous tactic in future cases if appellate courts continue to indicate it's the defendant's burden.

7. THE COURT IMPOSED AN EXCESSIVE AND UNREASONABLE BAIL.

The United States Constitution guarantees that "Excessive bail shall not be required..." Eighth Amendment. This is carried over in Article I, Section 20 of the Washington State Constitution and is understood to mean that bail is not imposed with the intent to keep a defendant incarcerated, but to impose

conditions that will allow a surety that the defendant will appear at further hearings.

There is no record that Mr. Grenning violated any of the conditions of release set March 4, 2002, after which he was out on bail of ten thousand dollars until his second arrest on April 2, 2002. After his second arrest it is clear he was unable to post a bond for the one hundred thousand dollar bail imposed, which rendered the purpose for increasing it to five million dollars on June 11, 2002 utterly inconsistent with state and federal constitutional protections. Furthermore, the requirement of "cash only" is entirely unreasonable and clearly "excessive" considering Mr. Grenning's financial state.

"The disadvantages for the accused who cannot obtain his release are...serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness....Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Barker v. Wingo, 407 U.S. 514, 33 L. Ed.2d 101, 92 S. Ct. 2182 (1972). Counsel for Mr. Grenning did not invoke an Eighth Amendment objection during a bail hearing, but did articulate concerns over the inhibiting effect its imposition had on his ability to work with Mr. Grenning on "a case of this magnitude." RP (03/05/04) at 38.

"[T]he only apparent purpose in requiring 'cash only' bond to the exclusion of other forms provided in [the rules] is to restrict the accused's access to a surety and, thus, to detain the accused in violation of [the State Constitution]." State ex rel. Jones v. Hendon, 66 Ohio St. 3d 115, 609 N.E.2d 541 (1993). The imposition of a 'cash only' bail is violative of the State Constitution Article I, Section 20 and not authorized by CrR 3.2. City of Yakima v. Mollett, 115 Wn. App. 604, 63 P.3d 177 (2003). The five million dollar bail placed on Mr. Grenning violated his right to a reasonable bail guaranteed by the Eighth Amendment and imposed on him unconstitutional restrictions which impeded his ability to prepare for trial. His charges should be reversed and remanded for new trial with an order that a reasonable and constitutional bail be imposed.

8. CUMULATIVE ERROR DENIED MR. GRENNING A FAIR TRIAL.

The cumulative error doctrine prescribes the reversal of a defendant's convictions if the errors in trial may individually not warrant reversal, but taken together prove to be too prejudicial to uphold conviction. State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

It is the appellant's argument that each of the reasons outlined in the foregoing, apart from perhaps the violations of media, merit a reversal of his convictions. However, even if the court does not find reversible error on every point, taken together, the cumulative violations are too egregious to be passed off as mere harmless error. The appellant was subjected to unconstitutional treatment from the day he was arrested without a proper warrant and continually prejudiced by the State's fraudulent investigation, negligence in disclosing evidence, incrementally increased unconstitutional bail, unlawful disclosures to the relevant media, prosecutorial misconduct, and ultimately the deprivation of his speedy trial rights by the State's perjury and negligence. The Cumulative Error doctrine requires reversal of Mr. Grenning's convictions.

9. THE TRIAL COURT DID NOT UPHOLD MR. GRENNING'S RIGHT NOT TO LOSE PROPERTY WITHOUT DUE PROCESS BY FAILING TO RULE ON HIS MOTION TO RETURN PROPERTY.

The United States Constitution provides that "No person shall be...deprived of...property, without due process of law; nor shall private property be taken without just compensation." Fifth Amendment. The Superior Court Criminal Rules of Washington read in part that a person may petition the court for return of property "The person is lawfully entitled to possession thereof" in compliance with the United States Constitution. CrR 2.3(e).

Mr. Grenning submitted a motion for return of property, (see attached motion CrR 2.3(e)), on October 22, 2004 before the Honorable James Orlando, CP at 10/22/04, RP 1038, and though the State's comments reflected concurrence with the requests made in the motion, the court declined to rule on it. RP 1039. The appellant is not aware that any ruling has since been made.

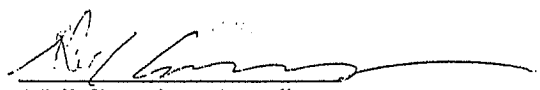
It is unreasonable for the court to fail to rule on defense's motion in a timely manner. Appellant asks this court to order the return of property in compliance with the Fifth Amendment or remand for further proceedings.

D. CONCLUSION

Appellant respectfully submits that his convictions be overturned and remanded for new trial and that his return of property motion be remanded for further court proceedings. If the Appellate Court finds the appellant's speedy trial rights were violated, he submits that his convictions be reversed and dismissed.

Dated this 30 day of April, 2005

Respectfully submitted,



Neil Grenning- Appellant

TO: NEIL GRENNING

The EnCase Disc Imaging Tool is supplied by:

Guidance Software
572 East Gram Street, Suite 300
Pasadena, CA 91101

Tel: 626 229 9191
Fax: 626 229 9199

Web: http://www.guidancesoftware.com

For information the company technical department can be contacted by telephone, and they are willing to get whatever information is requested.

As for my inquiries about the EnCase 3.18 3.20 and 3.22 the following was obtained over the phone:

THE ENCASE IMAGING TOOL OPERATES ON MSDOSS AND WINDOW

THE DIFFERENCES BETWEEN THE THREE VERSIONS ARE MAINLY CORRECTING SOME SOFTWARE PROBLEMS.

WHEN COPYING THE HARD DRIVE EXTRA HARDWARE WOULD BE REQUIRED TO AVOID ALTERING THE ORIGINAL HARD DRIVE. THIS HARDWARE IS KNOWN AS "WRITE BLOCKING HARDWARE OR "FAST BLOCK" THIS HARDWARE IS ALSO REQUIRED WHEN COPYING THE HARD DRIVE FROM A MAC COMPUTER.

THOUGH THE ENCASE 3.18 3.20 AND 3.22 CAN BE USED TO COPY A HARD DRIVE FROM A MAC COMPUTER, IT IS NOT IDEAL AND WILL REQUIRE THAT A LOT BE DONE IN MANUAL. TO COPYTHE HARD DRIVE FROM A MAC COMPUTER; ENCASE VERSIONT 4.18A or 4.12 SHOULD BE USED. The 4.18A WAS NOT AVAILABLE BEFORE APRIL 2004 AND THE 4.12 WAS AVAILABLE ABOUT APRIL 2003.

ANY CHANGES MADE TO THE COPY OF THE HARD DRIVE WOULD BE INDICATED WITH DATE AND TIME, UNLESS WRITE BLOCKING WAS USED DURING THE SEARCH.

THE RECORD OF THE SEARCH, WITH DATE AND TIME WOULD BE AVAILABLE BY THE USE OF BOOK MARKING. THE BOOK MARKING WILL THUS MAKE IT POSSIBLE TO PRINT OUT A RECORD. THE BOOK MARKING WILL SHOW TIME AND DATE OF EACH SEARCH.

THE BOOK MARKING WOULD HAVE TO BE DIRECTLY FROM THIS COPY, WHICH AGAIN CAN BE COMPARED WITH ANOTHER COPY COPIED BY THE DEFENCE. IF THE TWO COPIES ARE NOT IDENTICAL THERE ARE ERRORS, DELIBERATE OR BY ACCIDENT. CLEARLY THIS IS NOT A JOB THAT CAN BE DONE WITHOUT SUPERVISION OR OVERSIGHT BY ALL PARTIES. IT HAS TO BE CONFIRMED THAT THE COPIES OF THE HARD DRIVE ARE TRUE COPIES AND THE SEARCHES HAVE TO BE DOCUMENTED.

IF IT IS NOT POSSIBLE TO AFFERM THAT ALL THESE CRITERALS HAVE BEEN MET THERE IS NO WAY OF TELLING WHERE THE INFORMATION CAME FROM.

komotv.com

komo 4!

A Sickening Discovery

April 3, 2002

By Bryan Johnson

TACOMA - Pierce County prosecutors suspect a 24-year-old man, Neil Grenning, who is already accused of raping a 4-year-old South Tacoma boy, may have had other victims.

Police served a search warrant and checked the hard drive of Grenning's computer. They say they found 3,000 sexually explicit child pornography pictures.

Tacoma police spokesman Jim Mattheis says the children in the pictures ranged in age from babies to teenagers. He also indicated there are signs that Grenning may be in some of those pictures.

Mattheis urges any parent to whom the name is familiar, or to whom Grenning's picture is familiar, or who have children who's photos were taken by Grenning - who is an amateur photographer - to contact Tacoma police so they can determine what involvement Grenning had, if any, with their children.

Police set up this special hotline for parents: (253) 591-5501.

Wednesday, Grenning entered a plea of not guilty to rape of a child and 20 counts of possession of child pornography.

If he is convicted, Grenning faces 20 years to life in prison.

He is currently in the Pierce County jail, with bail set at $100,000. If he is released, he will be ordered to have no contact with children, and will be living with relatives in the Auburn area.

THE NEWS TRIBUNE
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Police allege man had 3,000 photos saved

IN COURT: Neil Grenning, 24, pleads not guilty; officials not sure if local children depicted

April 04, 2002

Stacey Burns and Karen Hucks; The News Tribune

Prosecutors on Wednesday accused a Tacoma man of possessing 20 graphic images of child pornography after detectives said they found 3,000 such pictures on the man's high-powered computer.

Investigators said Neil Grenning, 24, considered himself an amateur photographer and was especially interested in taking photos of children.

Most of the 3,000 photos are of white boys and range from infants to early teens. Some were taken at campgrounds, beaches and parks, others indoors, said police detective Ed Baker.

Charging papers provide graphic details of more than 20 photos, including images of boys being raped by men and other boys, a girl being raped by a dog and an infant being raped by a man.

Investigators do not know whether Grenning took any of the photos, whether any of the subjects are local youths or whether he sold or traded the photos.

"How many (photos) were produced by him and how many were downloaded (from the Internet), we don't know," Baker said.

Grenning pleaded not guilty to 20 counts of possession of depictions of a minor engaged in sexually explicit conduct with sexual motivation. Prosecutors added the charges to a first-degree child rape count brought against Grenning in March.

Superior Court Judge Sergio Armijo ordered Grenning held in Pierce County Jail in lieu of $100,000 bail. Grenning's attorney, Robert Bryan of Seattle, declined to comment after the hearing.

Investigators said Grenning was a student at Bates Technical College and a waiter at a Puyallup restaurant. Before that, he graduated from Pacific Lutheran University. He moved to Tacoma a few years ago from Florida and was living with three roommates in the 7200 block of South G Street.

Several of Grenning's neighbors said they didn't know the man or declined to talk about him.

Investigators found homemade business cards for photography work at Grenning's home. They also found parental consent forms, but have yet to call the parents who signed them.

Investigators also are examining Grenning's computer. Baker said the computer's server rivals the size, speed and capabilities of the police department's.

Police arrested Grenning last month on suspicion of raping a 5-year-old neighbor boy he baby-sat last year. The boy's mother called police after her son was acting strangely and said Grenning had

molested him.

Officers arrested Grenning on a child rape charge.

In a later interview with police, the mother said Grenning had shown her a digital photograph of her son. When she asked the boy about the photo, he told her Grenning had taken nude photos of him, according to police.

Detectives seized Grenning's computer and searched it for photos of the boy, Baker said. While doing that, investigators found the 3,000 pornographic images. As of Tuesday, investigators had reviewed 200 of the photos.

If convicted of all the charges against him, Grenning - who has no criminal record - would face a standard sentencing range of 20 to 261/2 years in prison. A judge also could levy an exception sentence of life in prison.

Baker said Grenning did not appear to be part of Operation Candyman, a national investigation into child pornography on the Internet.

"There is nothing that leads us there," he said.

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* Reach staff writer Stacey Burns at 253-597-8268 or stacey.burns@mail.tribnet.com.

SIDEBAR: Tacoma police ask anyone with information on Neil Grenning to call detective Ed Baker at 253-591-5501.

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Police Need Your Help In Dangerous Sex Predator Case

June 20, 2002

By Tracy Vedder

TACOMA - There are new developments in what Tacoma detectives call the worst case of child torture, rape and pornography they have ever seen.

Prosecutors added new charges to the case against 24-year-old Neil Grenning, bringing the total to 63 counts of rape, molestation and pornography.

Grenning is pleading not guilty to all of the charges.

The one victim Tacoma police have identified is only 5-years-old. And Grenning allegedly knew him for a relatively short period of time.

"Obvoiusly to gain the child's trust in that short amount of time, and to continually violate him like he did -- he's an extreme predator," said Jim Mattheis with the Tacoma Police Department.

Investigators believe there are other

Video : KOMO 4 NEWS

Investigators believe there are other victims, and they are releasing a photograph of the suspect at a party with kids in some type of public building.

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Video requires the use of the free QuickTime Player.

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More child sex charges emerge against Tacoma man

KAREN HUCKS; The News Tribune

Photos found on a computer in Australia showing a 7-year-old boy being raped led Pierce County prosecutors to file 10 more counts Tuesday against a Tacoma man already facing 62 sex charges.

Neil Grenning, 25, pleaded not guilty Tuesday in Pierce County Superior Court to 10 counts of child rape, child molestation and sexual exploitation of a minor based on photos taken of a boy on a camping trip.

"This is just disgusting," deputy prosecutor Hugh Birgenheier said. "I want to make sure he's punished for what he did."

Mike Kawamura, Grenning's attorney, said he hadn't seen the charges yet, so he couldn't comment on them. He wouldn't say whether Grenning denies committing the crimes.

"It's going to be up to a jury to decide whether or not he did these things," Kawamura said.

Grenning, a waiter and photographer who graduated from Pacific Lutheran University, already faced 62 counts of child rape, molestation, exploitation, assault and possession of child pornography. Investigators estimated he had about 3,000 sexual images of children on his computer.

The latest charges could double the amount of time Grenning is likely to face in prison, if convicted, to 53 years. But prosecutors also might seek an exceptional sentence much longer than that standard range.

Kawamura said prosecutors' initial plea offer was for Grenning to plead guilty and agree to an exceptional sentence of 75 to 100 years in prison.

The latest charging documents say authorities in Brisbane, Australia, called Tacoma police in April to say they'd recovered Internet "chats" between Grenning and other suspects and photographs including Grenning or that Grenning had taken.

Tacoma police then found photos on Grenning's computer of a man touching and raping a 7-year-old boy, documents say. In the intercepted chats, Grenning describes the assault on the boy, Birgenheier said.

His face is not visible on the photographs, but prosecutors believe his descriptions of the crimes help prove he committed them.

"Awesome isn't a big enough word," charging documents describe Grenning as saying during a chat session. "This takes the cake over any sexual experience I have EVER had."

Prosecutors say the boy, now 9, was a relative of someone Grenning went to college with. They went camping together twice during the summer of 2001, and at least once Grenning shared a tent with the boy, charging documents say the college friend told police.

When investigators talked to the boy, he said he remembered the camping trip but didn't recall being assaulted, charging documents say. Prosecutors theorize Grenning drugged the boy, perhaps with NyQuil cold medicine.

Grenning, held in Pierce County Jail on $5 million bail, is scheduled for trial on the first group of charges in January. He does not have a criminal record.

Karen Hucks: 253-597-8660

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(Published 12:01AM, October 29th, 2003)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

State of Washington

Plaintiff

v.

Neil Grenning

Defendant

No. 02-1-011 06-05

Motion for return of property pursuant in part to CrR 2.3 (e)

Defendant, by and through his attorney, moves the court to order the return of certain property items seized in conjunction with the case at bar, pursuant to CrR 2.3 (e) and standards allowing that the state no longer requires the retention of seized items.

I. FACTS

On March 5, 2002, Detective Baker, Sergeant French, Detective Graham, and Detective Voce served upon 7241 S. G Street a search warrant, signed by Judge Cohoe, and took into possession a number of computer related devices, books, photographs, and clothing hereto listed in the receipt of items seized herein attached as "Exhibit 1." On June 7,

2004 defense brought before the court a motion to suppress pursuant to CrR 3.6 which was denied by Judge Orlando. On June 14, 2004 the court reviewed each item pursuant to the warrant to establish whether submission as evidence before a jury was appropriate and numerous items were found by Judge Orlando to be either inflammatory, prejudicial, or irrelevant, and properly excluded as questionably meritorious.

II. Argument and Law

The United States Constitution provides that "No person shall be... deprived of... property, without due process of law; nor shall private property be taken without just compensation." Amendment 5. The Superior Court Criminal Rules of Washington (CrR) 2.3 (e) reads in part that a person may petition the court for the return of property "The person is lawfully entitled to possession thereof" in compliance with the constitution, Amendment 5.

On June 14, 2004 Judge Orlando found the following items to be inadmissible in court proceedings:

1.) Item 11- 2 books on Child abuse/1 tape- Edu 151/3 pages from paper [exhibit 6D]

2.) Item 12- Purple shirt + 2 white socks [exhibit 7E]

3.) Item 28- Photos in plastic found [] in photo album [exhibit 6C]

4.) Item 29- Flannel pants [exhibit 10]

5.) [not listed on receipt of seized property] 2 family photographs depicting nude children [exhibit 6E]

It is defense's position that these items be returned to the defendant or party acting on his behalf as they were property excluded from trial. In regards to item 5 [exhibit 6E] the

applicable statute prohibits possession of depictions of minors engaged in sexually explicit conduct; it does not wholly and unconditionally prohibit the possession of depictions of nude minors, State v. Huckins, 66 Wn. App. 213, 836 p.2d 230 (1992). A minor does not engage in sexually explicit conduct merely by playing on a playground or merely taking a bath, State v. Grannis, 84 Wn. App. 546, 930 p. 2d 387 (1997).

On June 14, 2004 the State established in the court record that the following items had been returned to the property room and would not be offered as exhibits or evidence:

1.) Item 18- Sony VCR #0298171

2.) Item 20- Macintosh monitor #5G2310FEE04

3.) Item 21- Apple Monitor #55813---

4.) Item 22- Multisync M700/NEC Monitor #85030590C

5.) Item 23- Epson Printer Model P9538 #A5D0026214

6.) Item 24- Mouse + Keyboard- Apple #NW8130Mu33G

7.) Item 26- Sohoware hub #638160396

8.) Item 27- RCA Modem #65726038146240

9.) Item 31- Macintosh software

It is defense's position that the State has conceded these items have no relevancy to prosecution, were in fact, not entered as evidence against the defendant, and may be returned to the defendant or party acting on his behalf pursuant to CrR 2.3 (e).

A computer and optical storage media are not merely single purpose items used to facilitate a sole function, but rather are utilized to manage and improve the facility of numerous domestic and business applications. "The trial court aptly described a personal computer as 'the modern day repository of a man's records, reflections, and

conversations.'" State v. Nordlund, 113 Wn. App. 171, 53 p.3d 520, 2002. "[S]uppression and return of property are separate and distinct inquiries." Kitty's East v. United States, 905 F.2d 1367, 1372 (10 Cir. 1990). If the government's investigatory and prosecutorial interests can be served by retaining copies of the documents, it is unreasonable for the government to refuse to return the original documents to the owner, see Ramsden v. United States, 2 F.3d at 326-27. "The court can order the government to return property to the owner, and yet still permit the government to introduce the property- or copies of it, in the case of documents at trial." J.B. Manning Corp. v. United States, 86 F.3d 926, 927-28 (9th Cir. 1996).

On June 16, 2004 Detective Voce of the Tacoma Police Department testified in court that he did not locate any illegal material on the defendant's SCSI drive nor any of the supplemental removable storage devices. Pursuant to J.B. Manning Corp. v. United States defense asserts it is reasonable and prudent for the State to return all optical storage media that does not contain illegal material as the State's purposes can be served by retaining copies:

1.) Item 2- CD's- quantity: 9

2.) Item 3- zip disks- quantity: 24

3.) Item 4- Floppy disks- quantity: 13

4.) Item 5- Nylon Case W/42 CDs/3-3.5 floppy

5.) Item 6 Zip disk

6.) Item 7- San Disk- compact Flash Adapter

7.) Item 8- Zip disk in case

8.) Item 9- 3.5 floppy

9.) Item 10- Kodak picture CD

10.) Item 25- SCSI drive within CPU

It is defense's position that all the computer devices and paraphernalia seized pursuant to the March 5, 2002 search warrant were lawfully purchased and owned by the party from whom it was seized. The State may argue that the defendant forfeits possession of the property because it was used in the commission of a crime, however to do so would be tantamount to alleging that an owner forfeits the possession of a file cabinet due to select contents. The State does not allege the computer system was used solely for the purpose an illegal act and testimony concedes a majority of the storage media pointed to lawful purposes. The Court would be violating the defendant's 5th Amendment rights providing property shall not "be taken without just compensation" were it to determine the forfeiture of legally owned property is penologically justified. See State v. Cole, 128 Wn. 2d 262, 906 p.2d 925, 1995 Wash.:

> United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992) ("we continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statues and the disregard for due process that is buried in the statutes."); United States v. One Parcel of Property located at 508 Depot Street, Garretson, Minnehaha County, 964 F.2d 814, 818 (8th Cir. 1992) ("we are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, in a single drug transaction"), rev'd sub nom. Austin v. United

States, U.S., 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

Defense also directs the court's attention to provisions allowed in State v. French, 2004 in which a laptop computer alleged to have possessed child pornography was returned to the defendant after authorities removed the offending material from internal drives. The State cannot demand the forfeiture of an entire legally owned computer system as punitive motion nor more than it could demand the forfeiture of a defendant's Newsweek magazines were they to be stacked with other offending or visual material. Defense thereby asks the court to order the return of the following seized items:

1.) Item 15- Kodak digital camera w/Box

2.) Item 16- Polaroid Sprintscan- Scanner #K901757E

3.) Item 17- Yamaha CDRW #ABL0018434

4.) Item 19- Microtec ScanMaker V600 #5819193859

5.) Item 25- Apple Macintosh CPU PowerMac #XA8220XMD2K [drives addressed separately]

Defense is also unclear about Item 13 "white envelope collected by E-Baker" which was not submitted at trial, nor was any reference to it made. Defense has not been given an opportunity to inspect this item buts asks the court to draw an adverse inference and order its return to the defendant or party acting on his behalf.

III. CONCLUSION

The State has seized numerous items which bear no relevancy to prosecution, were properly excluded by the court, and evidence no illegal activity, retained merely to present evidence of quantity. Defense finds ample reason to believe the State's continuing purposes can be served by retaining copies of material, and that the forfeiture

of legally owned devices used for a wide variety of legal purposes would violate defendant's Fifth Amendment rights.

Defense hereby petitions the Court to return all items listed herein in compliance with CrR 2.3 (e) and the Fifth Amendment of the United States.

Respectfully submitted this ____ day of _____ 2004.

_____

Neil Grenning

CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2005, I caused a true and correct copy of Statement of Additional Grounds by Appellant to be served on the following via prepaid first class mail:

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Neil Grenning 04-30-05
Neil Grenning Date State of Washington